

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND A. MCCULLER,

Defendant-Appellant.

UNPUBLISHED

January 11, 2005

No. 250000

Oakland Circuit Court

LC No. 02-183044-FH

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a second habitual offender, MCL 769.10, to two to fifteen years in prison. We affirm.

Defendant argues that the trial court erred in excluding rebuttal testimony of a defense witness under MRE 608(b). Because defendant failed to make an offer of proof on the record to provide this Court with the information it needs to evaluate the claim of error, the issue is unpreserved and will be reviewed to determine whether the exclusion of evidence constituted a plain error affecting a substantial right. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Generally, all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). “Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001) (citation omitted). The credibility of witnesses is also a material issue and evidence which shows bias or prejudice of a witness is always relevant. *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001); *People v Mills*, 450 Mich 61, 725; 537 NW2d 909, mod, remanded by 450 Mich 1212 (1995). Even if relevant, evidence may be excluded if it is a needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000); *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004).

At trial, two of defendant's employees testified. The first employee, Gregory Thompson, testified for the prosecution that defendant admitted to beating the victim. The second employee, Daniel Hahn, testified for the defense. The defense sought to admit, through the testimony of Hahn, specific acts by Thompson that tended to show a settled grudge against defendant. The prosecution, citing MRE 608(b), obtained a ruling by the trial court prohibiting this testimony. Pursuant to MRE 608(b), a witness generally may not be impeached with extrinsic evidence regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). But, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue, if the rebuttal evidence closely bears on the defendant's guilt or innocence. MRE 608(b); *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002); *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

Defendant did not make an offer of proof regarding what Hahn would have testified to at trial. However, assuming that Hahn would have testified that Thompson plotted to break into defendant's business and poison defendant's dog, as questions by defense counsel would indicate, this testimony goes to the Thompson's bias towards defendant and does not closely bear on defendant's guilt or innocence. And, even if it were found that Hahn's refutation of Thompson's testimony bore a close connection to defendant's guilt, it was not error to exclude the testimony where Thompson himself testified to facts that gave him a reason to resent defendant and where Hahn testified directly that Thompson was biased against defendant. Any further testimony by Hahn regarding a plot by Thompson to poison defendant's dog and to break into defendant's business, would have been cumulative as to the issue of bias. Because the trial court has discretion to exclude cumulative evidence, *Sabin, supra* at 58; *Houston, supra* at 467, there was no error in the trial court's exclusion of Hahn's testimony.

Defendant also argues that the trial court erred in scoring the sentencing guidelines. Again, we disagree.

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record which adequately supports a particular score, and thus, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *Houston, supra* at 471; *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Because the assault occurred after January 1, 1999, the legislative sentencing guidelines apply to this case. MCL 769.34(2); *People v Hendrick*, 261 Mich App 673, 679-680; 683 NW2d 218 (2004). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); *People v Babcock (Babcock I)*, 244 Mich App 64, 72; 624 NW2d 479 (2000), rev'd on other grds 469 Mich 247 (2003). In calculating the appropriate guidelines range, a court must determine the offense category and which offense variables apply, score the variables, and total the points, and then assess points for the prior record variables. MCL 777.21(1)(a); MCL 777.21(1)(b); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The court must then use the resultant offense variables score and prior record variables score with the sentencing grid to determine the recommended minimum sentence range. MCL 777.21(1)(c); *Morson, supra* at 255. In calculating the points under certain offense variables, multiple circumstances might apply, and the court must assess the highest applicable points. The

sentencing guidelines ranges are subject to enhancement if the defendant is a habitual offender. MCL 777.21(3); *Houston, supra* at 474. Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Defendant argues that the trial court lacked sufficient evidence to score Offense Variable one (OV 1) at ten points instead of at zero. The trial court must assess a score of ten points under OV 1 if the victim was touched by a weapon other than a knife or stabbing weapon. MCL 777.31. Zero points are to be assessed if no aggravated use of a weapon occurred. At trial, the victim testified that he saw defendant making a downward motion toward his head with a metal pipe or a bat. The victim testified that he was then struck in the head and rendered unconscious. This testimony amply supported the trial court's assessment of ten points for OV 1.

Defendant also argues that Offense Variable two (OV 2) was erroneously scored at one point. The trial court must assess one point under OV 2 if the offender possessed any potentially lethal weapon other than a firearm, incendiary device, knife or other stabbing weapon. MCL 777.32. As stated *supra*, the victim testified that defendant assaulted him with a metal pipe or bat. A metal pipe or bat used to strike a person in the head is unquestionably a potentially lethal weapon. The victim's testimony was sufficient to support an assessment of one point for OV 2.

Finally, defendant argues that the trial court erred in assigning twenty-five points for Offense Variable three (OV 3), when there was no medical evidence introduced at trial to substantiate the victim's injuries. The trial court must assess twenty-five points under OV 3 if life threatening or permanent incapacitating injury occurred to the victim. MCL 777.33. As the trial court noted in its order denying defendant's motion for resentencing, the victim testified that he suffered a broken nose, broken eye socket and broken cheekbone, and his skull was fractured and his inner ear wall caved in as a result of the beating. The victim also testified that he suffered a concussion and a closed head injury. This testimony, as well as Thompson's testimony that defendant stated the victim "could have been dead," and described the victim as "half dead" after the beating, supported the a factual finding that the victim suffered life threatening injuries. Further, the victim testified that his already bad hearing worsened as a result of the beating, establishing that the victim suffered a permanently incapacitating injury. The fact that the victim's testimony was not corroborated by a medical professional or by the admission of the victim's medical records does not alter the fact that the victim's testimony alone was sufficient to establish the nature and extent of his injuries for the purpose of assessing twenty-five points under OV 3. With our determination that OV's 1, 2 and 3 were appropriately scored, defendant's minimum sentence of two years falls within the appropriate sentencing guidelines range and must be affirmed by this Court. MCL 769.34(10); *Kimble, supra* at 309.

Finally, citing *Blakely v Washington*, 542 US ____; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that the jury did not find beyond a reasonable doubt the factors underlying OV's 1, 2 and 3, i.e., that defendant beat the victim with a weapon and that the victim sustained life threatening or permanently incapacitating injuries, and that defendant should be resentenced. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the

jury's verdict or admitted by the defendant. However, in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), the Michigan Supreme Court found that the holding in *Blakely* regarding determinate sentencing schemes does not apply to the indeterminate sentencing system in place in Michigan. *Id.* at 730 n 14. Defendant is not entitled to be resentenced on the basis that his sentence violated the Sixth Amendment.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder